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Supreme Court of the United States

AKTIESELSKABET "CUZCO", as owner of the Norwegian Steamship *"Toluma"*, Petitioner, *vs.* Steamship *"Sucarseco"*, her engines, boilers, etc., SUBMARINE BOAT CORPORATION, Respondent, (and two other cases) WEST INDIA OIL COMPANY and J. H. SENIOR, Agent, AMERICAN INSURANCE COMPANY, *et al.*, Respondents.	OCTOBER TERM, 1934. No. 524.

BRIEF FOR THE PETITIONER.

STATEMENT OF THE CASE.

I. *The Jurisdiction.*

This cause comes before this Court on a writ of certiorari to the Circuit Court of Appeals for the Second Circuit filed pursuant to the provisions of the United States Code, Title 28, Section 347 (a), on November 10, 1934, and granted on December 3, 1934 (R. 61).

II. *Reference to Opinions Below.*

The Opinion of the United States District Court for the Southern District of New York is reported in 4 Fed. Supp. 344.

The Opinion of the Circuit Court of Appeals for the Second Circuit is reported in 72 Fed. (2d) 690.

III. *The Record.*

The case arises out of a collision between the Norwegian steamship *Toluma*, owned by this Petitioner, and the American steamship *Sucarseco*, which occurred at sea, off the Atlantic Coast, on the night of November 22, 1928.

The Record consists of the various pleadings filed on behalf of the respective vessel owners, and of owners of Cargo on the *Toluma* (R. 3-24); a Stipulation of Agreed Facts (R. 28), which incorporates the contract of carriage between the *Toluma* and her Cargo (R. 31-32A); a General Average Agreement (R. 33); and a (separate) General Average Statement; also, opinions of the United States District Court, Southern District of New York (District Judge Robert P. Patterson) (R. 36), and of the United States Circuit Court of Appeals (Circuit Judges Manton, Swan and Chase) (R. 51).

It is not sought to review here any question of negligent navigation or seaworthiness, as it is agreed that the collision was caused by faults or errors of navigation on the part of both vessels; and, that both vessels were seaworthy (R. 28). The matter involved here concerns solely the question of law as to whether or not the owners of Cargo on the *Toluma* have a cause of action enforceable (directly) against the owner of the non-carrying vessel, *Sucarseco*, for recovery of contributions paid to the Petitioner, as

owner of the carrying vessel, *Toluma,* on account of expenses of a general average nature, and under the circumstances here.

IV. *The Facts.*

At the time of the collision, on the night of November 22, 1928, the *Toluma,* owned by Aktieselskabet Cuzco, the Petitioner, was proceeding on a voyage from New York to South American ports, via Norfolk, Va., with a general cargo, having left New York on November 17, 1928, and Norfolk on the early afternoon of November 22, 1928. The *Toluma* was being operated as a common carrier. The other colliding vessel, the *Suçarseco,* owned by Submarine Boat Corporation, was bound from New York to Pacific Coast ports, via the Panama Canal, with a general cargo, and was also being operated as a common carrier.

Both vessels sustained physical damage by reason of the collision, but there was not any direct physical damage to the cargo on either vessel.

The *Sucarseco* proceeded on her voyage, but, the *Toluma,* having sustained damage which it was deemed necessary to repair, put back into Norfolk, Va., to effect the collision repairs. Part of the cargo on the *Toluma* was there discharged, and, the repairs having been effected, the cargo was reloaded, and the *Toluma* resumed her voyage and made delivery of the cargo to the several ports of destination.

The contract of carriage between the *Toluma* and Cargo on board the *Toluma,* contained a clause, numbered "12", (R. 31, 32A), known as the "Jason Clause", and which is here reproduced in full:

"12. General average shall be adjusted and payable according to York-Antwerp Rules of 1890 and Antwerp Rule of 1903, and as to matters not therein provided for, according to the laws and usages at the port of New York, or at shipowner's option, at last port of discharge. The general average in every instance shall be prepared by average adjusters selected by the shipowner. In case of danger, damage or disaster resulting from accident or from faults or errors in navigation or in the management of or from any latent or other defect of the vessel, her machinery or appurtenances, from unseaworthiness, even though existing at the time of shipment or at the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence and if the shipowner shall have exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied with respect to the matters concerned in the aforesaid danger, damage or disaster, then the shippers, consignees or owners of the cargo or the holders of this bill of lading shall nevertheless pay salvage and any special charges incurred in respect of the cargo and shall contribute with the shipowners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure of any common peril, all with the same force and effect and to the same extent as if such accident, danger, damage or disaster had not resulted from or been occasioned by faults or errors in navigation or in the management of the vessel or by any latent or other defect or unseaworthiness. The shippers, consignees, owners of the cargo or holders of this bill of lading shall make a deposit in cash or give a satisfactory guaranty, as the shipowner or Master may determine, equivalent to the

proportion of such charges that may be estimated by the shipowner or Master to become due from the cargo. Salvage services rendered to the goods by another vessel owned by or in the service of the shipowner shall be paid for as fully as if such vessel were owned by or in the service of strangers."

In pursuance of the terms of that Clause, a General Average Statement was prepared, which included all expenditures and disbursements incurred and paid by the Petitioner incidental to putting into the repair port to effect the repairs, and embracing about ninety-three items (R. 29).

The contributions stated to be due from the various interests were subsequently paid, as previously agreed by the terms of the Jason Clause.

V. *The Proceedings Below.*

(a) The original libel was filed on April 9, 1929, by the Petitioner, Aktieselskabet Cuzco, as owner of the *Toluma,* against the steamship *Sucarseco,* etc., claiming damages sustained by the Petitioner (Libelant), and the *Toluma,* "consisting of the cost of repairs, demurrage, *cost of discharging cargo to effect repairs, and other incidental and consequential damages* • • •," *i. e.,* including all expenditures made by the Petitioner at the repair port (R. 5).

(b) A cross libel was filed on December 9, 1929, by Submarine Boat Corporation, as owner, and Transmarine Corporation, as charterer in possession, of the American steamship *Sucarseco,* against the steamship *Toluma,* and Aktieselskabet Cuzco, as owner, and Grace Line, Inc., as charterer, claiming the physical and incidental damages sustained by the steamship *Sucarseco* (R. 6-8).

(c) A libel was first filed on December 29, 1930, by West India Oil Company, *et al.*, as "owner, shipper, and underwriters of certain cargo laden on the steamship *Toluma,*" against the Receivers for Submarine Boat Corporation and Transmarine Corporation, owner of the *Sucarseco;* and, the amended libel of West India Oil Company, *et al.*, against the Receivers was filed on February 9, 1933, claiming payments [*direct* from the non-carrier, *Sucarseco* interests], of their proportions of general average contributions made by the various cargo interests in pursuance of the General Average Statement and agreements (R. 16-21).

The above suits were consolidated by order, and were submitted to the United States District Court for the Southern District of New York, under the Stipulation of Agreed Facts, and exhibits incorporated therein, and with comprehensive briefs; and, the decision of the District Court, by written opinion filed on June 23, 1933, resulted in dismissal of the libel of West India Oil Company, *et al.*, against the Receivers (*Sucarseco*), but provided for recovery back of a proportionate part of Cargo's contributions in general average, which were recoverable by the Petitioner as a part of its "collision damages" (R. 40, 42-43).

West India Oil Company, *et al.*, as owners, shippers and/or underwriters of Cargo laden on the *Toluma,* entered an appeal from that decision of the District Court, to the Circuit Court of Appeals for the Second Circuit, which resulted in sustaining the libel of West India Oil Company, *et al.* (cargo owners), and allowing a *direct* recovery from the Receivers (the non-carrying vessel *Sucarseco*) of the full amount of Cargo's contributions which they had agreed to make under the terms of the contract of carriage with the Petitioner (*Toluma*).

VI. *The Opinion of the District Court.*

The Opinion is reported in 4 Fed. Supp. 344.

The Court expressed the issue as follows:

> "The question is whether in a collision case where both vessels were at fault, the cargo owner may recover from the non-carrying vessel not merely the physical damage suffered by cargo but also the amount which he has paid as contribution in general average to the carrying vessel, liability for such contribution having resulted from the presence of the 'Jason Clause' in the contract of affreightment" (R. 37-38).

The Court stated:

> "The liability of a cargo owner to contribute in general average toward sacrifices or losses suffered by the shipowner is comparable to the liability of an insurer of maritime risks. Where the damage to hull is caused solely by the fault of a stranger, the primary liability to make the loss good is on the stranger, and the liability of the cargo owner to the ship owner in general average is no more than secondary. These views were set forth in *Pool Shipping Co.* v. *United States,* 33 Fed. 2nd, 275, 277 • • •" (R. 38).

On authority of the cases of *The Irrawaddy,* 171 U. S. 187, and *The Jason,* 225 U. S. 32, the District Court held that the cargo owner is not obliged to contribute in general average to sacrifices or losses of the carrier, where the collision, as here, was brought about by negligence of the carrier, unless there is an express agreement to do so, as contained in Clause 12, *i. e.,* the "Jason Clause"; and, the Court stated:

> "From these views it must follow that the cargo owner whose goods have not been injured but who has paid contribution in general average toward making good the loss suffered by his carrier in a collision with another vessel in which both vessels were guilty of negligent navigation has no direct right of action against the other vessel. His only basis of recovery against the other vessel is by subrogation to the right of the carrier" (R. 39).

As to the case of *The Energia,* 66 Fed. 604, relied upon by the Respondents (cargo owners), the Court concluded that: "The case did not involve any of the questions presented here" (R. 39).

Furthermore, that since the burden to contribute fell upon the cargo owners by reason of their agreement with the carrier, their loss arose only because of their contract with the carrier, and the District Court stated that: "In the eye of the law such damages are too remote", citing *Robins* vs. *Flint,* 275 U. S. 303; *The Federal No. 2,* 21 Fed. 2nd, 313; *Insurance Co.* v. *Brame,* 95 U. S. 754 (R. 39-40).

Finally, the Court held that the cargo owners would be entitled to get back from the *Toluma* (Petitioner) only "their proportionate part of one-half the damages allowed to the *Toluma* of a general average character" (R. 40).

VII. *The Opinion of the Circuit Court of Appeals.*

The Opinion is reported in 72 Fed. (2d) 690.

The Circuit Court of Appeals modified the decision of the District Court by awarding a full recovery to the Respondents (cargo owners) of all of their contributions toward the port expenses, as a direct right against the non-carrying vessel, *Sucarseco,* thus depriving the Petitioner

of its *(primary)* right to recover as a collision damage the port expenses which the Petitioner had incurred and paid, and which were thereafter made the subject of general average contributions from cargo owners to the *Toluma.*

The Circuit Court of Appeals predicated its decision on the proposition, as stated, that: "in a suit by cargo for collision damages, no distinction purely as an element of damage is to be made broadly between physical damage and damage sustained by cargo by reason of general average contributions" (R. 53), citing the case of *The Energia* (C. C. A.) 66 Fed. 604; and that the "principle" of that case is applicable here; and, so the Court stated:

> "Consequently, there can be no distinction in respect to general average contributions by cargo being recoverable as damages by cargo in its own right between a situation where a collision between ships is due to the sole fault of the carrying ship and one where both ships are at fault * * *" (R. 55).

[The case of *The Energia* is discussed in the following text, pp. 19-21, 41-43.]

The Court regarded the "Jason Clause" as a means whereby the cargo owner was enabled to have the master act "as its agent", and, "to secure that right, cargo agrees to contribute in general average though the Harter Act would otherwise excuse it from so doing", citing *The Irrawaddy,* 171 U. S. 187 (R. 56).

[The case of *The Irrawaddy* is discussed in the following text, pp. 15-18; and that of *The Jason* at pp. 22-24.]

The Court then apparently proceeded on the theory that incorporation of the Jason Clause (providing for general

average contributions despite negligence of the carrier) into the contract of carriage (between the carrier, *Toluma*, and its Cargo) had the same force and effect [even as to third parties] as if the liability to contribute had been imposed by maritime law; and, so the Court stated:

> "provided the legal relationship of cargo and carrier coupled with the occurrence of events for which the tort feasor is legally responsible creates a general average situation *that requires cargo to contribute*, it may then recover such contributions from the tort feasor, as in *The Energia, supra*" (R. 57). (Italics ours.)

Further, the Court did not accept the conclusions of the District Court, *i.e.*, that the right of cargo owners (Respondents) here was derivative, and secondary to those of the Petitioner (*vis-a-vis*, the *Sucarseco*); nor that the claim of Respondents arose by reason of its special contract with the Petitioner [incorporation of the Jason Clause into the contract of carriage]; nor that the Respondents were asserting a claim against a "stranger" [*Sucarseco*] to that special contract; but that the claim asserted was based on a tort to the Cargo committed by the *Sucarseco* (R. 57).

The Circuit Court of Appeals awarded the cargo owners full recovery against the owners of the *Sucarseco* on these conclusions, instead of, as did the District Court, awarding only such proportionate part of their contributions as the Petitioner might recover directly from the *Sucarseco* as "collision" damages.

VIII. *The Question at Issue.*

The sole question presented here is:

Whether a cargo owner, suffering no physical damage, and not liable as a matter of general maritime law for a general average contribution because the carrying vessel involved in a collision was negligent, may nevertheless sue and recover from the non-carrying vessel, although jointly negligent, a general average contribution paid to his own vessel solely because of a special contract between him and his own vessel, to make such a contribution, to which contract the non-carrying vessel was not a party.

The District Court succinctly expressed the issue as follows:

> "The question is whether in a collision case where both vessels were at fault, the cargo owner may recover from the non-carrying vessel not merely the physical damage suffered by cargo but also the amount which he has paid as contribution in general average to the carrying vessel, liability for such contribution having resulted from the presence of the 'Jason Clause' in the contract of affreightment" (R. 37-38).

Argument.

On behalf of the Petitioner, it will be argued here that:

The Petitioner's negligence having caused the port of refuge expenses, the Respondents would not have been obligated to contribute in General Average toward those expenses except for the Jason Clause in the contract of carriage.

The Respondents cannot rightfully recover from the owners of the *Sucarseco* the contributions made to the Petitioner only because of the contract of carriage, *i. e.*, the Jason Clause, to which contract the owners of the *Sucarseco* were not parties.

The Respondents' claim for refund of their general average contributions is derivative only, and not directly recoverable from the *Sucarseco;* and, they are entitled to recover back from the Petitioner only a proportionate share of the Petitioner's recovery from the *Sucarseco* of the items to which they contributed.

FIRST POINT.

THE PETITIONER'S NEGLIGENCE HAVING CAUSED THE PORT OF REFUGE EXPENSES, THE RESPONDENTS WOULD NOT HAVE BEEN OBLIGATED TO CONTRIBUTE IN GENERAL AVERAGE TOWARDS THOSE EXPENSES EXCEPT FOR THE JASON CLAUSE IN THE CONTRACT OF CARRIAGE.

(*a*) *General Aspect of the Situation.*

The Circuit Court of Appeals stated: "Since it is agreed that all of the contributions were of a general average nature in settlement of expenses properly includable in the average adjustment, we need not now pay further attention to that phase of the matter" (R. 54).

It may be added that it is also agreed that the items of expense towards which contributions were made were "collision" damages as well (R. 28-29).

There were numerous items of expense, but the more substantial amounts resulted from having to remove a

large part of the cargo in order to repair the *Toluma* (R. 30, (b), and Appendix I). It was necessary that the Petitioner (as owner of the *Toluma*) should remove the cargo in order to effect either temporary or permanent repairs, and whether or not the voyage was to be continued or abandoned. The situation is explained by the reports of the surveyors, pertinent extracts from which appear in "Appendix I," annexed hereto. The Petitioner paid the stevedoring, and wharfage expenses entailed, as it also paid for the labor and material used in repairing the physical damage to the vessel. Broadly viewed, the one was as much a part of the cost of repairing the vessel as was the other. That circumstance is material in considering the effect of the Petitioner's negligence in respect of collecting these expenses in General Average, as they fall within the classification of shipowners' "sacrifices" *Post*, p. 31; Appendix I.

The history and principles of the law of General Average were fully discussed by this Court in the case of *Ralli* v. *Troop*, 157 U. S. 386. Briefly stated, the object of a general average is to spread a loss or expense voluntarily incurred by one or more parties for the common benefit to save the whole from imminent danger, proportionately among all the parties to the maritime venture.

It was said by this Court, in *Ralli* v. *Troop, supra,* at page 400:

> "After a voluntary sacrifice of part of the adventure, and a consequent escape of the rest from imminent peril, the owner of the ship, or in his absence the master as his agent, has the duty of having an adjustment made of the general average, and has a maritime lien on the interests saved, and remaining in his possession, for the amount due in contribution

> to the owner of the ship; and the owner of goods sacrificed has a corresponding lien on what is saved, for the amount due to him. *Cutler* v. *Rae,* 7 How. 729, 731, 732; *Dupont* v. *Vance,* 19 How. 162, 168-171; *Strang* v. *Scott,* 14 App. Cas. 601, 606, 607; 3 Kent Com. 244."

So here the Petitioner caused a statement of General Average to be made, in which, as the Petitioner's "voluntary sacrifice," were included the costs of removing, storing and reloading the cargo, among a number of other items of expense, which the Petitioner paid. The "statement" was not issued until nearly a year after the event, the Petitioner's claim for reimbursement from Respondents having been protected in the meantime by their undertaking in the "Average Agreement" (R. 33). The contributions shown to be due by the statement were subsequently settled in accordance with the "statement" [adjustment of expenses].

It is conceded that that is the ordinary and proper procedure, either in cases where there is not any negligence on the part of any of the participating parties, or in cases where the parties have agreed to share the expenses despite that negligence; but the important question here is as to whether the Petitioner could have lawfully exacted from the Respondents their contributions towards the expenses, despite the Petitioner's negligence, and without the special contract, *i. e.,* the Jason Clause.

It is submitted that this Court's decision in the case of *The Irrawaddy,* 171 U. S. 187, has definitely answered that question in the negative.

(*b*) *The Rule of The Irrawaddy.*

The case of *The Irrawaddy* came before this Court on a certificate from the Circuit Court of Appeals for the Second Circuit. *Flint* vs. *Chrystal,* 88 Fed. 987. The question certified was:

> "If a vessel, seaworthy at the beginning of the voyage, is afterwards stranded by the negligence of her master, has the ship owner, who has exercised due diligence to make his vessel in all respects seaworthy, properly manned, equipped and supplied, under the provisions of section 3 of the act of February 13, 1893, a right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save vessel, freight and cargo?" 171 U. S., pp. 188-189.

This Court stated: "*Our conclusion accordingly is, that the question certified to us by the Court of Appeals should be answered in the negative, and it is so ordered.*" P. 196.

That conclusion may be said to have been forecast by this Court's language and decisions in the cases of *Lawrence* v. *Minton,* 17 How. (58 U. S.) 100, at page 111, and *The Portsmouth,* 9 Wall. (76 U. S.) 682, at page 684.

The circumstances in *The Irrawaddy* were, that the vessel having been stranded through negligence in navigation, expenses were incurred and losses sustained in freeing her from the strand. Subsequently, a general average having been stated, cargo owners declined to pay by way of contribution to the shipowner certain of the expenses involved, these being the gross freight on cargo jettisoned, and the

damages to the vessel by sanding and by the flow of water into the engine room, which resulted from a voluntary operation of the engines in an effort to move and float her. *Chrystal* vs. *Flint*, 82 Fed. 472, p. 473.

It had been held by the District Court (Judge Addison Brown) that the shipowner was entitled to contribution from cargo, but apparently on the ground that because the Harter Act operated to relieve the shipowner from liability for damage to cargo due to negligent navigation, it thereby extinguished the negligence, and justified a recovery in General Average by the shipowner, as if there had not been any negligence. 82 Fed., pp. 474-475. Also, on the further ground that to hold otherwise would create situations "disastrous to cargo"; and, that "maritime policy and necessity" should forbid establishing a rule to the contrary (*i.e.*, depriving the shipowner of the right of contribution). 82 Fed., p. 477.

This Court, however, declined to accept that view. The Court first considered the effect of negligence of a participating party, in the law of General Average, apart from [*before* the enactment of] the Harter Act (Act of February 13, 1893, c.105. 21 Stat. 445; see *Appendix* II); and, the Court stated:

> "Not only is the ship owner excluded from contribution by way of general average *when the loss arises from the ship's fault*, but he is legally responsible to the owner of the cargo for loss and damages so occasioned." Pages 189-190. (Italics ours).

The Court then considered the effect of the provisions of the Third Section of the Harter Act (Appendix II) in its bearing on the general rule above quoted, and decided

that the Harter Act did not alter the rule with respect to the carrier, *i.e.*, did not confer upon the carrier any right to exact general average contribution from cargo, where the carrier was guilty of negligence inducing the general average expenses. Pages 196-197. The shipowner was, therefore, not allowed recovery from cargo of the shipowner's "sacrifices" (expenses and/or losses).

Perhaps it is unnecessary to go any further, for the American law on this general proposition must be regarded as definitely settled by the pronouncement of this Court. However, it may be added that the codes of European and South American countries, with few exceptions, announce the same principle. The law of England is to the same effect. Lowndes' General Average, Sixth Edition, "Comparative Table of the Laws of General Average", Preface, page XXXIV, and Appendices A to Y, pages 419-731. [Appendix III attached.]

It may also be remarked that the dissenting opinion in the case of *The Irrawaddy, supra,* page 196, was based on the conclusion (held to be erroneous by the Court) that the Third Section of the Harter Act eliminated altogether the question of negligence of navigation, which was the conclusion, [also erroneous] of the District Court. Mr. Justice Brown, who wrote the dissenting opinion, had, nevertheless, previously decided, sitting as a District Judge in the case of *The Ontario* (D. C. E. D. Mich.) 37 Fed. 220, that the shipowner whose vessel is stranded by negligent navigation could not recover [from his insurance company] his damages and expenses of a general average nature in releasing the vessel, (*before* the Harter Act), stating, at page 222:

> "If this were an action by the ship-owner against the owner of the cargo for a general average con-

> tribution, we apprehend that it would be a sufficient answer to show that the necessity for the sacrifice was occasioned by the negligence or unseaworthiness of the ship. We understand the law to be as stated in Gourl. Gen. Av. 15, that 'if the necessity for the general average act arises through the unseaworthiness of the vessel, the *vice propre* of the cargo, or the negligence or barratry of the master or crew, no contribution generally would be due. If the danger and the necessary sacrifice are produced by the fault of the vessel or captain, and the vessel appears as a claimant for contribution, it would seem a proper answer that he by whose neglect the loss had been produced should bear it without relief.' See, also, Lowndes Av. 138; *Chamberlain* v. *Reed*, 13 Me. 357; *The Ann Elizabeth*, 19 How. 162; *Ross* v. *The Active*, 2 Wash. C. C. 226; *The Jenny Jones*, Deady, 82; *Bentley* v. *Bustard*, 16 B. Mon. 643; *The Norway*, Brown & L. 377; *Schloss* v. *Heriot*, 14 C. B. (N. S.) 59."

[Parsons On Shipping, Vol. I, pp. 353, 357, 411; and cases cited in Gourlie on General Average, par. 6, pp. 15-16, to the same effect.]

In view of the reliance placed upon the case of *The Energia*, 61 Fed. 222, and 66 Fed. 604, by the Circuit Court of Appeals in the present case, it is to be emphasized that the rule laid down by this Court later in *The Irrawaddy*, *supra*, had been recognized by the District Court, Judge Addison Brown, and by the Circuit Court of Appeals for the Second Circuit, in affirming the District Court's decision in *The Energia*.

(c) *The Relevancy of The Energia.*

In that case, the *Energia* had collided with a schooner in the Lower Bay of New York, and was held solely at fault. Because of the collision damage, the *Energia* put back to New York (as a "port of refuge") for repairs, there discharged her cargo, made repairs, reloaded cargo, and proceeded on her voyage to Shanghai, her port of destination. Cargo's proportion of all the expenses at the "port of refuge," New York, in the nature of general average charges, were exacted by the shipowner from the consignees at Shanghai, under the law of the port of destination, which was the law of England (Great Britain). Later, in the District Court for the Southern District of New York, cargo owners sued for recovery back of the contributions thus made, and the recovery was allowed because the *Energia* had caused the damage by her own (sole) negligence. The Harter Act was not then available as a defence, not being in operation at the time of collision.

District Judge Addison Brown (who decided the case of *The Irrawaddy* in the District Court) expressed the same principle of the American law of General Average as was later announced by this Court in *The Irrawaddy, supra,* stating, at page 224:

> "The grounds of the general average charges in this case were the necessary services and expenses rendered to and for the ship and cargo upon their return to this port, as a port of refuge; the charges were made necessary by the collision, and by nothing else; the particular charges were for the cargo alone. If the adjustment of average could have been made here, those charges would not have been allowed against the cargo, because of the ship's fault

(*The Ontario,* 37 Fed. 220; Snow *v.* Perkins, 39 Fed. 335; Ralli *v.* Troop, 37 Fed. 890); but as the adjustment is lawfully made under a foreign law, which does not recognize any liability in the ship under the exceptions of negligence in the bill of lading, and therefore allows her to collect these charges from the cargo in the first instance, our law, which takes note of the foreign law as a fact, and as one of the circumstances of the voyage on which this collision occurred, must, in order to give complete restitution, allow the cargo owner to recover back the charge which the collision, under the foreign law of average adjustment, has imposed upon the cargo, because that charge was the necessary result of the collision according to the law of the destination upon the voyage on which the ship was engaged. This does not at all reverse the foreign law of adjustment; it simply recognizes that law as a fact, and the payment of average as a necessary result of the collision. Our law, as the law of the forum, must govern in the adjustment of damages upon a collision happening here (*The Scotland,* 105 U. S. 29, 30); and hence full restitution must be given according to our law alone."

While the above quoted remarks may be susceptible of interpretation that the learned Judge had in mind only the "particular charges," *i. e.,* some special charge against cargo, the context of the opinion shows that the charges of a "general average" nature were also included, page 223.

The Circuit Court of Appeals for the Second Circuit (the same Court which decided the present case), accepted the District Court's conclusions, stating, 66 Fed. 604, at page 608:

> "It only remains to consider the claim to be reimbursed for the general average and special charges exacted from the cargo upon adjustment at Shanghai. Upon this branch of the case, we concur in the reasoning and conclusion of the district judge, * * *"

then quoting excerpt from the District Court's opinion, as above.

The "reasoning of the District Judge" was that the cargo having been *obliged* to pay to the shipowner the contributions under the foreign law, had sustained a loss due to the tort of the shipowner, for which the latter was ultimately liable to cargo (under the American law then existing, *i. e.,* without the defense of the Harter Act); but it is plain that the District Court held the view that if the American law had been applicable to the general average situation, the tortious shipowner could not have enforced collection of the contributions from cargo in the first place. That is the law laid down by this Court later in the case of ***The Irrawaddy.***

In failing to recognize that principle announced by the District Court in *The Energia,* and apparently approved by this same (earlier) Court, it is believed that the Circuit Court of Appeals erred, and misconceived the real purport of the decisions in both *The Irrawaddy* and *The Energia.* Indeed, the learned Court seems to have disregarded that controlling circumstance (*i. e.,* the Petitioner's negligence) in the present case, and refers to *The Irrawaddy* case only casually and in connection with the Jason Clause. It is respectfully suggested that the Circuit Court of Appeals would have reached a different conclusion, if the principle of the law of General Average settled by *The Irrawaddy* had been applied here.

Since the Circuit Court of Appeals has coupled its two references to the case of *The Irrawaddy* with its conclusions as to the meaning and effect of the "Jason Clause" (R. 56), it is opportune to comment here on this Court's decision in the case of *The Jason,* 225 U. S. 32.

(*d*) *The Limited Purport of The Jason.*

The circumstances in the case of *The Jason* were that the Norwegian steamship Jason while bound from Cuba to New York with a general cargo, was stranded through the negligence of her navigators, the steamship being seaworthy in all respects. The vessel was relieved from the strand by the jettison of cargo, and the services of salvors; and the vessel was convoyed to New York, and there delivered the cargo.

The bills of lading (contracts of carriage) contained a clause of similar tenor to Clause 12 in the present case, now known as the "Jason Clause." *Ante,* p. 4.

Disputes having arisen between shipowner and cargo owners as to the apportionment of the expenses, cross libels resulted, the shipowner claiming contribution from cargo owners, and the latter declining to pay expenses incurred by the ship on the grounds of unseaworthiness and negligent navigation. The District Court dismissed both libels, 162 Fed. 56, that of the shipowner because of the finding that the ship was navigated negligently and stranded thereby, and applying the ruling of *The Irrawaddy,* 171 U. S. 187, but without giving effect to the "Jason Clause."

The case then went to the Circuit Court of Appeals for the Second Circuit, 178 Fed. 414; and that Court considered the effect of the "Jason Clause," and its validity, but

subsequently decided to certify the questions of law to this Court.

Accordingly, this Court took up the case on the certificate from the United States Circuit Court of Appeals for the Second Circuit, and arrived at the following answers to the certified questions:

> "1. Whether the general average agreement above quoted from the bills of lading is valid, and entitles the shipowner to collect a general average contribution from the cargo-owners, under the circumstances above stated, in respect of sacrifices made and extraordinary expenditures incurred by it subsequent to the stranding for the common benefit and safety of ship, cargo and freight."
>
> Answered "yes" (affirmative).
>
> "2. Whether, in view of the provisions of the third section of the Harter act the cargo-owners, under the circumstances above stated, have a right to contribution from the shipowner for sacrifices of cargo made subsequent to the stranding, for the common benefit and safety of ship, cargo and freight?"
>
> Answered "yes" (affirmative).
>
> "3. Whether the cargo-owners, under the circumstances above stated can recover contribution from the shipowner in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose."
>
> Answered "no" (negative).

After reviewing its decision of *The Irrawaddy, supra*, this Court reiterated that the Harter Act did not entitle a shipowner to share in the general average rendered

necessary by the shipowner's negligence, page 54; but, "so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo-owners for a participation in general average contribution growing out of such negligence", page 55; and, the Clause was, therefore, held to be valid.

The answers to the foregoing certified questions logically result, so that where the shipowner and cargo owners have contracted with and among each other in the terms of the Jason Clause, they may exact contributions in general average from each other, in a proper case of general average, despite the negligence of any of the parties, the right being reciprocal.

Nevertheless, the decision in *The Jason* case, to the foregoing effect, does not alter the rule in *The Irrawaddy* case; and, as applied to the situation in the present case, the conclusion from both cases is that the shipowner, Petitioner here, could not have enforced against the cargo owners, Respondents here, the collection of contributions to the shipowner for expenses incurred by the shipowner although of a general average nature, but for the fact that the shipowner and the cargo owners had incorporated the Jason Clause in the contract of carriage, and were bound by it.

In other words, *but for the Jason Clause* the Respondents need not have made any contribution to the shipowner toward the expenses which the latter incurred.

(e) *Errors and Inconsistencies of the Decision Here.*

It was said by the Circuit Court of Appeals here as to the Jason Clause that:

> "It affords a means by agreement for parties in the venture to give to the master authority to act as agent for cargo for the purpose of incurring general average expenses which he would not have under the Harter Act as shown by *The Irrawaddy*, 171 U. S. 187" (R. 56).

The meaning intended to be conveyed by these quoted words is not clear. *The Irrawaddy* certainly did not decide that the Harter Act operated to prevent the master from incurring expenses of a general average nature. On the contrary, the Harter Act was eliminated as a controlling influence, or as a factor, in applying the principles governing the American law of General Average. All that the Supreme Court decided was that the shipowner's negligence was not excused in a general average situation, and that the law of General Average with respect to negligence remains unchanged by the Harter Act.

If the Court intended to imply that the Jason Clause was necessary in order to bind the Cargo to a general average sacrifice, where the sacrifice was made to relieve the vessel (and Cargo) from a situation of peril induced by the negligence of the shipmaster, that is true.

It is also said that:

> "This Jason Clause is not in any real sense a diminution of the rights cargo would otherwise have. On the contrary it enables cargo to have the master as its agent at the time and place of the peril to act for it to make such sacrifices as may be timely and effective to avoid greater loss. And to secure that right cargo agrees to contribute in general average though the Harter Act would otherwise excuse it from so doing. *Irrawaddy, supra*" (R. 56).

These statements also seem to indicate a misconception of the principles underlying a general average.

Undoubtedly the Jason Clause may, and generally does, diminish "the rights cargo would otherwise have"; for, the shipowner, if negligent, may not exact contribution from Cargo towards the sacrifices and expenses which the shipowner incurs, although for the common benefit, under *The Irrawaddy;* so that, Cargo is not obligated to pay (contribute) to the shipowner to reimburse the latter. But, if the cargo owner agrees to do so by accepting the Jason Clause, Cargo is then bound by its contract (only) to make the contributions. In short, the Jason Clause deprives Cargo of a *right* it would otherwise have, to refuse contribution to the negligent shipowner.

Again, Cargo does not require the Jason Clause to enable the master to act as its agent, as the quoted words imply. As this Court has said, the master acts, "not for the shipowner alone, but also for the cargo owner." *Ralli* v. *Troop,* 157 U. S. 386, p. 397.

The last sentence of the quoted extract implies that Cargo, by subscribing to the Jason Clause and thereby enlisting the services of the master as its agent, undertakes to contribute in General Average (as a consideration for the master's services?) which Cargo would not have to do (*i. e.,* contribute) under the Harter Act.

It is not by force of ("under") the Harter Act that cargo would not have to contribute, but it is by reason of the negligence of the shipowner, under the basic principle of the law of General Average as announced in *The Irrawaddy.* That principle is apparently disregarded by the Circuit Court of Appeals throughout its opinion, and the distinction between an obligation imposed by law [*i. e.,*

the maritime law of General Average] and an obligation arising only by contract [agreement of the parties to the incorporation of the Jason Clause] is not recognized, nor applied.

Thus, the Circuit Court of Appeals, in continuing its discussion of the Jason Clause, stated:

> "And their" (cargo's) "liability to contribute in general average under this clause is in no true sense the less a general liability imposed by maritime law than it was when a general average situation was created as a matter of law merely by circumstances occurring on a voyage" (R. 56).

That statement implies that the conception and use of the Jason Clause in contracts of carriage has altered the maritime law of General Average, which, of course, is not justified by the ruling of this Court in the case of *The Jason,* 225 U. S. 32, and, *a fortiori,* of the ruling in the case of *The Irrawaddy.* Although "the responsibilities of the carrier were subject to modification by law," and it was competent that the Congress should modify these responsibilities by legislative enactment, as in the Harter Act, *The Jason, supra,* page 49; it does not follow that the parties to a maritime adventure by entering into a special contract such as the Jason Clause have thereby changed the law of General Average. If that were so, it would seem that this Court by holding that the Jason Clause is valid, in the case of *The Jason,* intended to overrule its decision in *The Irrawaddy,* which cannot be so. The Jason Clause is not any more than an agreement between and among the parties to the adventure to adjust expenses of a general average nature, and to share the losses, as if there had not been

any negligence inducing the general average acts and consequences. It is essentially a private and special contract, and is not binding on any third party "stranger" to the contract. *Post*, p. 34.

(*f*) *Respondents' Theory of Legal Effect of Jason Clause Is Untenable.*

Counsel for Respondents apparently concede the soundness of the Petitioner's major contention, that Respondents (Cargo) were not obligated to contribute towards shipowner's port of refuge expenses. Thus, it was stated by Counsel in Brief in Opposition to Petition for Writ of Certiorari that:

> "Possibly, in the absence of a Jason Clause, the cargo owners would not have been bound to contribute to expenses incurred by the master even though such expenses were of a general average nature; but neither would the master have been bound to incur them."

The last clause above quoted, however, interjects a conclusion which is plainly untenable; and, its acceptance shows the error of the Circuit Court of Appeals here, for that Court proceeded on the same erroneous conception of the legal effect of the Jason Clause.

Thus, the theory of Respondents (Cargo) is that a shipmaster whose negligence induced a situation of danger to all property in the adventure need not take any action [*i. e.*, incur extraordinary expense] to save the property entrusted to his care, unless the shipowner is assured (by Jason Clause) that the expenses will be shared. The proposition is answered by merely stating it. It is inconceivable

that such a conclusion should have support by any Court. Nor is it believed that the Respondents can find encouragement by interpretation to that effect of this Court's language in its opinion in the case of *The Jason, supra.* Although this Court there expressed the view that the master's duty (as agent of the shipowner) did not extend so far as to "call for a sacrifice of a part of the owner's property if necessary to save the cargo," page 54; nevertheless, this Court apparently approved the proposition (advanced on behalf of cargo in that case) that "the master is nevertheless bound to exert every effort to save the property, and if he fail in this duty, his owners are liable to the cargo for the resulting loss," provided that statement should be modified by insertion of the word "*reasonable*" before effort. *The Jason, supra,* p. 54.

In the earlier case of *The Portsmouth,* 9 Wall. [76 U. S.] 682, this Court stated, at page 687:

> "Were it necessary, it would be easy to show that the conduct of the master *after* the vessel was stranded was entirely unjustifiable. *It was his duty even then to take all possible care of the cargo. He was bound to the utmost exertion to save it.* Losses arising from dangers of navigation, within the meaning of the exception in the bill of lading, are such only as happen in spite of the best human exertions, which cannot be prevented by human skill and prudence. But in this case no effort was made to save the cargo." [Italics ours.]

It was there decided that the jettison of cargo was not a subject of general average as it might have been saved if the master had been diligent.

Undoubtedly, the master (or the shipowner) may not lightly divest himself of the duty of "care and custody" of

cargo entrusted to the vessel for safe delivery to destination (Section 1, Harter Act, Appendix II). That duty is the burden of the Common Carrier.

Moreover, the Jason Clause, *per se,* cannot impose a legal obligation on the shipmaster (owner) to incur [extraordinary] expenses of a general average nature, which he would not otherwise have, either as the shipowner's agent, or as the agent for Cargo, as seems to be the contention for Respondents (Cargo) here, and as the Circuit Court of Appeals manifestly assumed. All that the Jason Clause does is to provide for sharing such expenses *when* made, despite negligence inducing them, although they would not otherwise be shared. To hold otherwise, so it is submitted, would be tantamount to holding that the case of *The Jason* overruled the case of *The Irrawaddy,* which is not so.

(*g*) *The Expenses of Port of Refuge Would Be Paid by the Shipowner but for the Jason Clause.*

Perhaps it is too speculative to predict what the master might have done on this occasion "in the absence of a Jason Clause." He (or the shipowner) might have reasonably concluded that an abandonment of the voyage was justifiable, and that the cargo should be transshipped, in which event, the costs of transshipment would have been a charge against the freight (shipowner), ordinarily. *58 Corpus Juris,* p. 502, Sec. 837, and cases cited. He would have had to remove the cargo from the *Toluma;* and, although he would probably not have been put to the expense of storing it, and certainly not of reloading it on the *Toluma,* the expense of transferring to another vessel would have been his (*i. e.,* a charge on freight).

So, even without the Jason Clause, and without the assurance that expenses incurred at the repair port (primarily directed to repairing the vessel) would be shared, it seems reasonable to conclude that the master of the *Toluma* would (and should) have acted just as he did, *i. e.*, make port, repair the vessel and proceed on the voyage; or, he would (or should) have transshipped at the shipowner's expense (on his freight).

(h) The Port of Refuge Expenses Here Are Similar in Legal Effect to Those Disallowed in The Irrawaddy.

It has been argued on behalf of Respondents that the decision in *The Irrawaddy* "related only to physical sacrifices of the shipowner's property" and did not deal with expenditures in a "port of refuge". It is true that *The Irrawaddy* did not have to put into a "port of refuge" for repairs; but the distinction suggested is immaterial in application of the principle of *The Irrawaddy* to the present case.

The shipowner in *The Irrawaddy* had not only made a "physical sacrifice" of his engines (damaged while operating on the strand), voluntarily and for the common benefit of cargo and ship, but he also sacrificed freight money on the jettisoned cargo. When the shipmaster threw the cargo overboard, he threw with it his lien for the freight. That was in reality just as much an "expense" to the shipowner there, as was the expense of discharging (removing) cargo in the present case. It would be a fine distinction, indeed, to hold that the two sacrifices were not similar in legal effect.

But, the Respondents argue, the "port of refuge" expenses here (the major items, apart from repairs to the

ship, being removal and reloading of cargo) were incurred by the shipowner (partly) as agent for the cargo. So, in *The Irrawaddy,* in the same sense, were the expenses of repairing his damaged engine, and the loss (expense) of his freight money (partly) incurred as agent for the cargo. If, then, cargo's alleged obligation to reimburse the shipowner in the present case is to be predicated on the theory of agency for the cargo, the question arises—why would not the same theory apply to the circumstances of *The Irrawaddy?*

If the Respondents' contention is tenable here, the same contention would have been tenable in the case of *The Irrawaddy;* and, if the reasoning and conclusions of the Circuit Court of Appeals here (agency for cargo is stressed throughout its opinion) had been applied by this Court to the situation in *The Irrawaddy,* the shipowner there would have been allowed to recover from cargo the latter's "proportion" of the shipowner's expenses. The shipowner was *not* allowed to recover there [*The Irrawaddy*] because his negligence induced the expenses; so here, the Petitioner [shipowner] would *not* be allowed to recover the part of refuge expenses, because of his negligence, under the American law of General Average, *but for the Jason Clause.*

(*i*) *The Practical Utility of the Jason Clause.*

It would be fruitless to comment on the reasons for drafting and using the Jason Clause. Possibly it operates to the advantage of both shipowner and cargo. Following the decision of this Court in *The Irrawaddy,* as it did, the fair inference is that its ultimate object was to give to the shipowner the right to make a valid contract with cargo,

which would eliminate the consequences of the shipowner's prior negligence inducing expenses of a general average nature, as between and among the parties interested in that particular adventure.

Nevertheless, by holding that the Jason Clause is "valid," it cannot be inferred that this Court altered, or intended to alter, the underlying principles of the maritime law of General Average as applied by American Courts, and, particularly, that principle announced in the case of *The Irrawaddy*. Negligence inducing a general average must still prevent the tortious party from recovering his losses and expenses, unless, as here, he is fortunate enough to have made a special contract (such as the Jason Clause) with his co-adventurers whereby the losses and expenses are to be shared. The resulting benefit to the shipowner is due solely to his advantageous contract.

(*j*) *Conclusion.*

The foregoing considerations lead to the conclusion that the contributions toward the expenses incurred and paid by the Petitioner, as owner of the *Toluma*, at the repair port, could not have been exacted from the Respondents, as cargo owners, under the American law of General Average, because of the Petitioner's negligence; and, it was solely because of the special contract between and among the parties, *i. e.*, incorporation of the Jason Clause into the contract of carriage, that the Respondents became obligated to contribute.

That conclusion forms the premise to the Petitioner's further contentions that Respondents should not be allowed a direct recovery from the joint tort feasor, *Sucarseco*.

SECOND POINT.

THE RESPONDENTS CANNOT RIGHTFULLY RECOVER FROM THE OWNERS OF THE *Sucarseco* THE CONTRIBUTIONS MADE TO THE PETITIONER ONLY BECAUSE OF THE CONTRACT OF CARRIAGE, *i. e.*, THE JASON CLAUSE, TO WHICH CONTRACT THE OWNERS OF THE *Sucarseco* WERE NOT PARTIES.

(a) *The Opposing Contentions.*

The Respondents maintain that there is a cause of action against the tortious colliding vessel (owners), the *Sucarseco*, for recovery in full of the contributions made by them towards the port of refuge expenses, on the theory that they were obligated by law to make the contributions; and that the obligation arose because of a tort committed by the *Sucarseco* to their property.

The Petitioner contends that since there was not any obligation imposed by law [*i. e.*, the law of General Average] upon the Respondents, and since the Respondents contributed only because of the terms of the contract of carriage, *i.e.*, the Jason Clause, the Respondents cannot enforce the claim against the *tort feasor* who is not chargeable with privity in the contract, nor with contemplation of the consequences which might arise by reason of the special contract, nor with intention to cause a breach of such a contract.

(b) *The Rule of Remoteness.*

If the Petitioner's contentions as set forth in the preceding text are sound, it seems obvious that there need not be any further discussion of the issue; for it is too well settled to be questioned that one may not recover a

"damage" which he has sustained solely because of his contract with another, and which he would not have sustained but for that contract, from a third party who is necessarily a "stranger" to the contract. A long line of cases have followed that proposition, in various situations, viz.: *Robins* vs. *Flint,* 275 U. S. 303; *Insurance Co.* vs. *Brame,* 95 U. S. 754; *The Federal No. 2* (C. C. A., 2nd Cir.), 21 Fed. (2d) 313; *The Steel Inventor* (D. C. S. D. N. Y.), 36 Fed. (2d) 399, p. 401; *Dale* v. *Grant,* 34 N. J. L. 142; *Anthony* v. *Slaid,* 52 Mass. 290; *Connecticut Insurance Co.* v. *New York R. R. Co.,* 25 Conn. 265; *Milton* v. *Story,* 11 Vermont, 101; *Rockingham Mutual Fire Ins. Co.* v. *Bosher,* 39 Me. 253; *Brink* v. *Wabash Railroad Co.,* 160 Mo. 87, and cases cited therein; also, *Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller* (Court of Appeal) (1922), 1 K. B. 127, 139, 142

It was attempted to distinguish the present case from the doctrine followed in the above cited cases in that the latter, so it was argued, dealt with "secondary damages sustained by the plaintiffs as a result of injury to the person or property of someone else". The distinction is not real; but, even so, the damages sustained by the "plaintiffs" here (Cargo), although they may have been consequential upon the collision between the carrier (the *Toluma*) and the *Sucarseco,* nevertheless, would not have resulted except for the setting into operation of the contract *voluntarily* entered into, by Cargo with *Toluma.*

(c) *The Cases on the Rule.*

Three (3) of the cases cited may be mentioned particularly, as illustrative of the application of the principle to the present case.

In the case of *Robins* vs. *Flint*, 275 U. S. 303, the steamship *Bjornefjord* was under time charter to Flint. It was the duty of the Owner to dock the vessel at stated times, payment of the hire to be suspended during the period necessary for docking. The Owner made a contract with Robins Dry Dock Company for docking, and certain repairs, to which contract the time charterer, Flint, was not a party. The Robins Company did not have any knowledge of the contract of charter at the time its contract with the Owner was made. During the course of the docking and repairs, the Robins Company (repairers) tortiously damaged the propeller of the vessel, necessitating extension of time in which to repair the propeller. The Owner and the Robins Company settled the damages as between the two, and later the time charterer, Flint, sued the Robins Company for loss of use of the vessel during the time of additional detention necessitated by repairing the propeller.

A recovery was allowed in both courts below, 13 Fed. (2d) 3; but, the Supreme Court reversed the lower courts, on the ground that the loss of the time charterer arose only by reason of its contract of charter with the Owner, and that the tort feasor, the Robins Company, while liable to the Owner for the latter's damage only, could not be held liable by the time charterer, Flint, since any right which Flint may have had arose from his contract with the Owner, which contract was not known to or contemplated by the Robins Company in making its contract with the Owner.

Mr. Justice Holmes, in delivering the opinion of the Court, stated, at pages 308-309:

> "The injury to the propeller was no wrong to the respondents but only to those to whom it be-

longed. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action, *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.,* 151 U. S. 1, no authority need be cited to show that, as a general rule, at least, *a tort to the person or property of one man does not make the tort feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong.* See *Savings Bank* v. *Ward,* 100 U. S. 195. The law does not spread its protection so far. A good statement, applicable here, will be found in *Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller,* [1922], 1 K. B. 127, 139, 140. *Byrd* v. *English,* 117 Ga. 192. *The Federal No. 2,* 21 F. (2d) 313." (Italics ours.)

The analogy of that case to the present case rests on the contract of charter, rather than on the contract for docking and repairs. The time charterer, Flint, was in the same position as Cargo on the *Toluma;* the Owner of the steamship *Bjornefjord* was in the same position as the owner of the *Toluma;* and, the Robins Company was in the same position as the *Sucarseco* interests. The injury (damage) inflicted by the *Sucarseco,* by reason of its tortious collision with the *Toluma,* was an actionable injury to the original libelant, the owner of the *Toluma,* this Petitioner, but not to Cargo in respect of Cargo's general average contributions, (a contractual obligation only).

The decision of the Circuit Court of Appeals of this Circuit in the case of *The Federal No. 2,* 21 Fed. (2d) 313, affirming the decision of the District Court, 14 Fed. (2d)

530, and cited with approval by the Supreme Court in the case of *Robins* vs. *Flint, supra,* also illustrates the legal situation here, as to remoteness of Cargo's claim against the *Sucarseco* interests (Receivers).

In that case, the tug *Federal No. 2* while towing the barge *Glooscap,* was charged with negligent management of the towline to the *Glooscap,* resulting in injury to one Parr, a member of the crew of the *Glooscap.* The owner of the *Glooscap* was obliged to pay certain hospital charges incurred in "maintenance and cure" of the injured member of the *Glooscap's* crew, which obligation arose from the contract of employment. The owner of the *Glooscap* then brought suit against *Federal No. 2* to recover the charges incurred, on the ground that the tort of tug *Federal No. 2* caused the injury to Parr, and rendered the tug liable for Parr's medical and hospital charges, paid by the owner of the *Glooscap.*

The District Court upheld exceptions to the libel, and dismissed the libel, stating, at page 531:

> "The right to maintenance and cure on the part of a seaman under our law *is contractual. The Hanna Nielsen* (C. C. A.), 273 F. 171; *The Bouker No. 2,* 241 F. 835, 154 C. C. A. 533." • • •
>
> *"It thus appears that the proximate cause of libelant's damage is the contract which it made with Parr, and I do not believe that the claimant can be held liable upon the producing of the contingency which makes the libelant liable under his contract."* (Italics ours.)

The Circuit Court of Appeals affirmed on the same grounds.

The English case cited by the Supreme Court in *Robins* v. *Flint, supra, i. e., Elliott Steam Tug Co., Ltd.* v. *The Shipping Controller* (Court of Appeal) (1922), 1 K. B. 127, 139, 142, involved a suit brought by charterers of the tug for compensation for damage done to their business by the requisition of the tug by the Admiralty, and its loss of use by the charterers. The suit was against the Shipping Controller (Admiralty), and the claim was disallowed. The words of SCRUTTON, L. J., at page 139, are pertinent:

> "At common law there is no doubt about the position. In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains without possession of or property in the chattel. *Such a person cannot claim for injury done to his contractual right.*" (Italics ours.)

Further, at page 142:

> "But in my opinion there is a deeper objection to the appellants' claim based on the common law principles already stated, namely, that *the charterer cannot get any damages for the loss of his purely contractual rights, whether in property or business.*" (Italics ours.)

(d) *The District Court Properly Applied the Rule.*

The District Court here, having properly concluded that Cargo's contributions were made solely because of the Jason Clause, a contractual obligation only, without any obligation to make contribution otherwise, applied the rule of the foregoing cases, and held that Cargo's claim here could not be properly asserted against the *Sucarseco*, stating:

"In the eye of the law such damages are too remote" (R. 39).

(e) *The Circuit Court of Appeals Erroneously Discarded the Rule.*

The Circuit Court of Appeals, while reiterating the rule of remoteness generally, distinguished the present case on the ground that the tort of the *Sucarseco* "affected the *Toluma's* cargo", and, that: "It was a direct contributing cause of the loss which was sustained by cargo. It made the expenses necessary" (R. 56).

But, it might also be said of the case of *Robins* vs. *Flint, supra,* that the tort of Robins affected the charterer, and directly contributed to the loss which was sustained by the charterer, in losing the use of the vessel; and, it might also be said that the tort of the tug *Federal No. 2* was a direct contributing cause of the Glooscap (owner) having incurred hospital charges for "maintenance and cure" of the injured member of her crew, and that the tort made the expenses necessary. However, the three cases discussed above, and the present case, are identical in this respect, that a situation developed whereby a party incurred expenses or losses only because of his contract with another party, although the tort of the third party set in motion events which brought the contract into operation; still, the claim of the incidentally and contractually injured party is too remote to be enforceable against the third party tort feasor.

Further, the Circuit Court of Appeals stated:

"We cannot subscribe to the theory that the terms of the contract of carriage are of any concern to the tort-feasor, provided the legal relationship of cargo

> and carrier coupled with the occurrence of events for which the tort-feasor is legally responsible creates *a general average situation that requires cargo to contribute.* It may then recover such contributions from the tort-feasor as in *The Energia, supra.*" (Italics ours.) (R. 57.)

Again, if the Petitioner's contentions as set forth in the preceding text, under the First Point, are sound, the "general average situation" which may have arisen because of the collision did not "*require cargo to contribute*", because Cargo was not bound to contribute under the law of General Average. The only legal obligation of Cargo (Respondents) to contribute was that Cargo had undertaken to do so by contract with the Petitioner.

(f) *The Decision in The Energia is "Sui Generis", and Was Misapplied Here.*

The case of *The Energia,* 61 Fed. 222, affirmed (C. C. A. 2nd Cir.) in 66 Fed. 604, has been adopted as the keystone of the Respondents' case here, and has been accepted by the Circuit Court of Appeals as determinative of the question at issue in the present case. It has been discussed in the preceding text. *Ante,* pp. 19-22.

The District Court considered the relevancy of that case, and properly concluded:

> "*The case did not involve any of the questions presented here.*" (Italics ours.) (R. 39.)

A comparison of the questions presented in the two cases as paralleled below fully justifies the District Court's conclusion:

The Energia.	*Present Case.*
May cargo owners recover back from the solely tortious carrier, with which they were in contractual privity, contributions which they were obligated to advance to that carrier by force of the (English) law of General Average applicable?	May cargo owners recover primarily from a third party non-carrier, jointly at fault with the carrier, with which non-carrier they did not have any contractual privity, contributions which they were *not* obligated to pay by force of the (American) law of General Average applicable, and which they paid only under voluntary agreement with the carrier?

The vital difference in the two cases is at once apparent: in *The Energia* the recovery (back) of Cargo's contributions was sought (and obtained) directly from the carrier, and a tortious third party was not involved; while in the present case the initial recovery is sought directly from the tortious third party only.

The Courts in *The Energia* held that the contributions were obligatory under the English law, but it was said that they would *not* have been obligatory (payable) under the American law. 61 Fed. 222, p. 224; 66 Fed. 604, p. 608. *Ante,* pages 19-21. So, it must follow that but for the circumstance that the English law was applied, cargo owners on the *Energia* would *not* have been obligated to pay General Average, and the exaction of contributions would have been "illegal". Under American law, they would not have been allowed the shipowner in the first place, and there would not have been any necessity of a suit to recover them back.

But, it has been argued that the obligation in *The Energia* case also arose by reason of a contract. Even so, the parties (carrier and cargo) were in privity as to that contract. The tort feasor, shipowner, was therefore chargeable with knowledge of the consequences which his "tort" would impose on Cargo by way of damages. That is the important distinction between the decision in *The Energia,* and the circumstances of the present case.

In other words, the circumstances of *The Energia* take that case (and decision) *out of the rule* laid down in *Robins* vs. *Flint, supra,* and other cases cited to the same effect. The circumstances of the present case bring this case squarely *within the rule.*

(g) *The Decision of the Circuit Court of Appeals is Fundamentally Unsound in Not Distinguishing Between a Liability in Tort and One Only in Contract.*

It was of course necessary in order to justify its decision that the Circuit Court of Appeals in the present case should regard the "damage" (contributions) as the direct result of a "tort" committed by the non-carrier, *Sucarseco.*

It was argued in the Brief in Opposition to Petition for Writ of Certiorari, page 3, that Cargo's "loss" was not caused by their contract with the *Toluma,* but by the collision between that vessel and the *Sucarseco;* and again, that physical damage to the *Toluma,* "or any other damage directly caused by the collision, is, of course, not the subject of general average contribution". *Brief in Opposition,* page 9. It is then stated:

> "Contribution in general average is due not in respect of any damage sustained either by hull or

> cargo in the collision; but is due only in respect of sacrifices or expenses *voluntarily* incurred by the master, as the representative of all interests, *after the collision has occurred and for the sole purpose of averting further loss. Ralli* v. *Troop,* 157 U. S. 386, 406, 409; *Burton* v. *English* (1883), 12 Q. B. D. 218, 223."

The two positions seem hardly consistent; but, the latter quoted statement emphasizes the Petitioner's contention, that it was not really the *tort* which placed a liability upon Cargo (Respondents) to contribute, but it was the *Contract.*

The Circuit Court of Appeals apparently did not recognize the distinction which Counsel for Respondents (Cargo) have made.

Reverting to the case of *The Energia,* the learned District Judge apparently regarded the general average contributions in that case as "the direct and natural consequence of the collision" as had been stipulated by the parties, page 223; and, the contributions were dealt with as an "item of damage" as between the *Energia* and Cargo. Nevertheless, it is not at all clear from that decision, (it was not there necessary to distinguish), whether the cause of action sounded *in tort,* or in *contract.* In reality, the negligence of the *Energia* constituted a breach of its contract, and the damage was recoverable as such, since the negligence clause there was invalid under the American law, and there was not any defense under the Harter Act. The situation was similar to that of a carrier who collects his full freight on lost cargo [primarily] by the terms of his contract of carriage; but, who must repay that freight if the cargo was lost through negligence

of the carrier, that is, through the carrier's breach of his contract.

It is believed that the error in the decision as it stands becomes apparent if this distinction between an action in tort and an action in contract is considered. As has been succinctly stated in "Burdick's Law of Torts", page 14:

> "The test to be applied is the nature of the right which has been invaded. If this right was created by the agreement of the parties, the plaintiff is limited to an action *ex contractu*. If it was created by law he may sue in tort."

In short, such "damage" [contributions] as the Respondents sustained here was *"ex contractu"*. They have not any cause of action against the *Sucarseco in tort.*

(h) The Authorities Cited in the Opinion of the Circuit Court of Appeals Do Not Support Its Conclusions.

1. *Ralli, et al.* v. *Societa Anonima di Navigazione, etc.* (D. C.) 222 Fed. 994.—A collision had occurred between the steamship *Aristea* and the steamship *Groningen,* due to faults in the nagivation of *both* vessels, resulting in equal division of the total damage. P. 996.

The *Aristea,* as a result of damage sustained in the collision, had to put back to her port of departure, *i. e.,* London, and expenses were incurred of a general average nature, which induced a general average adjustment as between the *Aristea* and her cargo. P. 995. Among the damages recovered by the *Aristea* from the *Groningen,* were items of damage which had been included in the general average statement and adjustment, to which cargo on the *Aristea* had contributed. The owners of the *Aristea*

received (credited with) from the *Groningen* one-half of the total of items of a general average character. Apparently the owners of the *Aristea* did not refund any part of the amount thus recovered from the *Groningen,* and suit was instituted by cargo owners on the *Aristea* against the owner of the *Aristea* for an accounting.

The Court stated at page 999:

> "The *Groningen* and the *Aristea* having paid each to the other one-half of the other's damage (by settlement of account), and the *Aristea* having thus received back from the *Groningen part of the loss* for which the cargo owners had contributed to some extent, the cargo owners now ask that the *Aristea* return to them *their just proportion.*" (Italics ours.)

The Court proceeded on the assumption that: "the owners of cargo shipped on her *were obliged* to contribute to her loss," referring to the *Aristea.* P. 999. [Not so in the present case.]

The Court allowed Cargo a recovery representing its *ratable proportion* of the one-half recovery which had been allowed its carrier, owner of the *Aristea,* as an item of the latter's damage asserted against the *Groningen;* that is, Cargo received a *refund* from *Aristea's* collection of one-half (50%) of Cargo's contributions in General Average to the *Aristea.*

That decision does not mean that cargo owners there could have recovered directly, as in tort, from the non-carrying vessel, the *Groningen* (like *Sucaresco* here). It means only that as a matter of *equity* the carrier should refund to Cargo a *ratable proportion* of the carrier's recovery, as to items which had been collected from Cargo.

That method of accounting (adjustment), between the *two* parties to the contract, is acceptable to the Petitioner in the present case. *Post*, p. 52.

2. *Erie & Western Transp. Co.* v. *The City of Chicago, et al.* (C. C. A.), 178 Fed. 42.—A steamer, *Conestoga*, laden with cargo, collided with a water-works crib built by the city of Chicago in navigable waters, due to the failure of the city to provide means of signalling (by bell) to warn moving vessels of the presence of the crib. The shipowner had not committed any negligence, so that a general average, which arose by reason of the collision, was lawfully stated and adjusted. The circumstances there gave the right (and obligation) of contribution under the American law of General Average. The nature of the right which had been invaded was thus one "created by law". However, that right was not asserted by Cargo, but by the Shipowner. The case does not present the matter in controversy in the present case.

3. *Gray's Harbor Tugboat Co.* v. *Petersen*, (C. C. A.) 250 Fed. 956.—That case also involved a collision, in which the carrier was *not* negligent. The contributions in General Average were compulsory, under the American law of General Average, and were *not* payable because of a special contract (the Jason Clause). But, it is to be remarked that the recovery of the general average expenditures was made by (allowed to) the shipowner, and not to contributing cargo owners. The items entering into the general average expenses were items of "collision damage", which the Shipowner had the primary right to assert and recover. Nevertheless, that case also did not involve the questions raised here.

By resorting to the foregoing American cases as authority for the proposition which the Circuit Court of Appeals has announced these cases stand for, it is respectfully submitted that the Court has thereby disclosed a misconception of the real issues in the present case.

(i) *The English Law Is Not Applicable.*

It is said by the Circuit Court of Appeals that: "The same rule obtains in England"; and the case of *The Minnetonka* (1905), Prob. Div. 206, is cited as authority for the statement. (R. 53).

The substantial difference between English law and American law with respect to contracts against negligence is reflected in the comparative viewpoints of the respective Courts in dealing with the law of General Average. Under English law, a general exception of negligence in the contract of carriage is regarded as wholly extinguishing negligence, and general average contributions are then deemed to be obligatory, by force of the maritime law of General Average, as if there had not been any negligence. That seems to be the purport of the decision in *The Carron Park,* 15 Prob. Div. 203. Cf. *The Ettrick,* L. R. 6 Prob. Div. 127 (Appendix III). Under the American law, the restricted exception (such as a Jason Clause) does not extinguish the negligence, *i. e.,* does not alter the law of General Average, but permits of adjustment (contributions) between the parties concerned. *The Irrawaddy,* and *The Jason, supra.*

The English and American laws relating to adjustment of collision damages also differ substantially. In a "both to blame" case, the damages are divided in a ratio of the comparative negligence under the English law, and the owner of cargo damaged on one vessel may recover from

the other vessel only such part as is equivalent to the degree of fault of the other (non-carrying) vessel. *The Umona,* 1914 P. 141; *The Measure of the Damages in Maritime Collisions,* 3rd Edition, by E. S. Roscoe, pages 20-22, and cases there cited. Under American law, the damages are divided equally (each bears one-half), but the cargo owner on the carrying vessel may recover his total *physical* damage from the non-carrying vessel (and none directly from the carrier, because of the Harter Act); *The Chattahoochee,* 173 U. S. 540.

English and American decisions can hardly be paralleled on the questions involved here. *The Irrawaddy, supra,* pages 194-195.

But, it is not believed that the case of *The Minnetonka, supra,* goes so far as to lay down a rule of law such as the Circuit Court of Appeals in the present case has applied. The Court of Appeal in that case allowed the Admiralty as owner of cargo on the *Uskmoor* to recover from the tortious non-carrier, *Minnetonka,* certain "damages" in the nature of substituted expenses, after abandonment of the voyage on which the *Uskmoor* was bound, the voyage having been abandoned because it was deemed that there would be a saving of expenses as compared to repairing the *Uskmoor* and continuing the voyage. The Admiralty had paid a "lump sum" to the *Uskmoor* to compensate the latter for her loss of freight. In the adjustment between the two vessels, the *Minnetonka* and the *Uskmoor,* that payment had not been considered (accounted for), and the Court held that a moiety of the amount should be made good to the Admiralty. It is apparent from a reading of the decision that the Court was more concerned as to whether or not the arrangement between the Admiralty and the *Uskmoor*

was "a reasonable compromise"; and, the Court apparently did not consider the claim as in the nature of one in General Average to be recoverable as such from the *Minnetonka.*

Incidentally, the case of *The Minnetonka* was cited by the late Circuit Judge MAYER, then sitting as a District Judge, in the case of *Ralli* v. *Societa Anonima, supra,* 222 Fed. 994; and Judge MAYER there stated, at page 999:

> "*But under English law such contributions are not regarded as part of the damage to be recovered from the wrongdoer.* This was held by JEUNE, J., in *The Marpessa* [1891], Prob. Div. 403, and I see nothing in *The Minnetonka* [1905], Prob. Div. 206, to the contrary." (Italics ours.)

It is true that in its decision in *The Minnetonka* the Court there apparently did not take the view expressed by the Court, in the case of *The Marpessa,* cited by Judge MAYER, as above. In that case, *i. e., The Marpessa,* the Court disallowed the shipowner's claim for recovery of his general average contribution towards making good a loss of cargo jettisoned from the *Marpessa,* although the latter was not at fault, the non-carrying vessel being solely liable. The claim had been put forward by the owner of the *Marpessa;* and the Court stated, at pages 408-409:

> "* * * The loss sustained by the ship, by having to make the general average contribution in question, was not caused by the collision, though, of course, it would not have occurred had not the collision happened. * * * it seems to me clear that it is the relation between ship and cargo out of which the obligation to make general average contribution arises, and not the antecedent collision that is the immediate cause of the loss to either ship or cargo by reason of the necessity of making such contribution. It is

an instance of the old distinction between *causa causans* and *causa sine qua non.*''

If the case of *The Minnetonka* stands for the rule applied by the Circuit Court of Appeals here, which is not conceded, it is suggested that the viewpoint expressed in *The Marpessa* would be preferable to the doctrine which it is now claimed is supported by the decision in *The Minnetonka.*

But, if the decision in *The Minnetonka* (1905) is to be so regarded, it is contrary to the rule as announced by the English Court of Appeal seventeen (17) years later in the case of *Elliott Steam Tug Co., Ltd.* vs. *The Shipping Controller* (1922), 1 K. B. 127, cited by this Court in its decision in *Robins* vs. *Flint.*

(j) *Conclusion.*

The foregoing considerations lead to the conclusion that the obligation under which Respondents (Cargo) contributed toward the port of refuge expenses, being wholly contractual, and the ''damage'' being the result only of the contractual relationship between the Respondents and the Petitioner, there cannot be any recovery from the non-carrying vessel, *Sucarseco,* in tort, since there was not any contractual privity between the Respondents and the owner of the *Sucarseco.*

THIRD POINT.

THE RESPONDENTS' CLAIM FOR REFUND OF THEIR GENERAL AVERAGE CONTRIBUTIONS IS DERIVATIVE ONLY, AND NOT DIRECTLY RECOVERABLE FROM THE *Sucarseco*; AND, THEY ARE ENTITLED TO RECOVER BACK FROM THE PETITIONER ONLY A PROPORTIONATE SHARE OF THE PETITIONER'S RECOVERY FROM THE *Sucarseco* OF THE ITEMS TO WHICH THEY CONTRIBUTED.

(a) *Respondents Are Entitled Only to an Accounting from Their Carrier.*

It is conceded that Respondents (cargo owners) should be entitled to have an "accounting" from the Petitioner, in respect of contributions made toward the expenses of a general average nature. That is simply a matter of equity and justice. *Ralli* v. *Societa, supra,* 222 Fed. 994. But, this Petitioner's contention is that the Respondents are not entitled to a *full* recovery of all contributions, since the Petitioner (carrier) has not made full recovery of the items of expense as "collision damage." The Respondents are limited to their *ratable proportion* of the Petitioner's recovery.

(b) *The Expenses in Dispute Are Primarily Recoverable by the Petitioner from the Sucarseco.*

The expenditures made by the Petitioner at the repair port ("port of refuge"), are properly recoverable as items of the "collision damages," as between the two colliding vessels. The major items (discharging, storing, and reloading cargo) were directly consequential to the repair work on the vessel. *Appendix I.* Under the principle of

restitutio in integrum, these expenses incurred and paid by the Petitioner, are recoverable by the Petitioner direct from the joint tort feasor, *Sucarseco,* the owners of which are *primarily* liable to the Petitioner. *The Baltimore,* 8 Wall. [75 U. S.] 377, page 385; *Williamson* vs. *Barrett,* 13 How. [54 U. S.] 101 (411), page 110 (416); *The Conqueror,* 166 U. S. 110, page 125; *The Margaret J. Sanford* (C. C., S. D. N. Y.), 37 Fed. 148, cases cited at page 152.

That a part of these several items constituted expenses of a "general average nature" was so, because of the contract between the Petitioner and the Respondents.

(c) *The Relationship is Analogous to that Arising from Insurance.*

Such rights as the Respondents may have are *derivative* from the *primary* right of the Petitioner. That limitation results from the *nature* of the relationship.

The analogy of a General Average situation to one of Marine Insurance has heretofore been applied by the Courts in considering Cargo's position *vis-a-vis* the carrier. *Pool Shipping Co., Ltd.* vs. *United States,* 33 Fed. (2d) 275; *Ralli* vs. *Societa,* 222 Fed. 994.

Authorities on the law of General Average emphasize the insurance relationship, and the analogy.

The early origin and history of "General Average" are traced by the authors of Lowndes' General Average, 6th Edition, "Introduction." It is older than the "custom" founding Marine Insurance, and laws and practices pertaining thereto; but the underlying cause of its origin and growth was the need of insuring or indemnifying the several partners in a marine venture against losses or expenses incurred for the common benefit, i.e., sharing such

losses and spreading them out *pro rata;* so General Average is in reality a method of *mutual protective insurance.*

Mr. Sanford D. Cole, in his book entitled "General Average Law and Rules," 1928, at pages 2-3, states:

> "General average is a method of distributing among a number of people the burden of a loss which would otherwise have fallen on one person. General average is therefore a method of arriving at the same result which might be reached by the alternative plan of insurance, but it is older in origin than marine insurance."

Under the insurance analogy, the doctrine of *subrogation* applies, and cargo has only a *subrogee's* right (as insurer of the proportion of the general average): *"In any form of remedy the insurer can take nothing by subrogation but the rights of the assured"; Phoenix Ins. Co.* v. *Erie Transp. Co.,* 117 U. S. 312, page 321. If the Petitioner recovers only a moiety of its damages, then Cargo may recover no more than that portion.

(d) *The Courts Have Heretofore Recognized and Applied the Insurance Analogy.*

The opinion of this Court in the case of *Pool Shipping Co., Ltd.* vs. *United States,* 33 Fed. (2d) 275, recognized the analogy of the general average relationship to that of insurance. In the *Pool* case, however, the non-carrying colliding vessel, *Apache,* was held solely at fault, and it did not become necessary to consider what proportion of the total recovery made by the *Clearpool* (innocent Carrier) should be allocated to cargo, in adjustment between the two

parties (*Clearpool* and Cargo). That is the question at issue in the present case [as between *Toluma* and Cargo].

The question decided in the *Pool* case was whether or not the *Clearpool,* having received certain contributions in general average from her cargo, should be allowed [also] to recover from the United States (*Apache*) these amounts as a part of the collision damage; and this Court held that the *Clearpool* could so recover, and would not have to deduct from its recovery the contributions thus received.

In its discussion of the analogy of the doctrine of subrogation (law of insurance) to a right of collection of general average expenses as a collision damage, the Court stated, at page 277:

> "While there seems to be no precise authority applicable to the present case, the *insurance decisions* show the correct principle involved. It has long been settled that payment of insurance affords no defense to the wrongdoer in an action for collision damages. *The Propeller Monticello* v. *Mollison,* 17 How. 152, 15 L. Ed. 68; *The Potomac,* 105 U. S. 630, 26 L. Ed. 1194. The cause of action survives and the insurer is subrogated. The obligation of the cargo to contribute to the sacrifice made in the common interest amounted to an involuntary insurance for the benefit of the hull. The *Apache* was primarily liable and the indemnifying cargo to the extent of its contributive obligation was secondarily liable. The latter was, therefore, in the position of a surety and entitled to subrogation." * * *
> "In either event the cause of action to recover it as part of the collision damages would remain intact, and the satisfaction of the decree for this item would give the respondent a good discharge. *The recovery*

> *to the extent of any amount theretofore contributed by cargo would be for its account.''* (Italics ours.)

The opinion in that case was written (delivered) by Circuit Judge Augustus Hand, who did not sit in the present case. The opinion of the Court in the present case characterized the result in *The Pool Company* case as [only] establishing "the right of the carrying ship to recover as bailee of the cargo" (R. 55); but, it was nevertheless recognized in *The Pool Company* case that the right of the carrier (Petitioner here) was *primary*, and that Cargo's right was only *derivative.*

Also, in the case of *Ralli* vs. *Societa, supra,* 222 Fed. 994, discussed in the previous text, *ante,* page 45, a similar analogy was invoked in determining cargo's "refund" from its own carrier, of portions of collision damage recovered by the carrier direct from the non-carrying vessel.

The Court stated, at page 999:

> "The *Groningen* and the *Aristea* having paid each to the other one-half of the other's damage (by settlement of account), and the *Aristea* having thus received back from the *Groningen part of the loss* for which the cargo owners had contributed to some extent, the cargo owners now ask that the *Aristea* return to them *their just proportion.''* (Italics ours.)

Also, at pages 999-1000:

> "The suggestion is offered that an analogous principle may be found in the obligation of indemnity arising in cases of marine insurance, where subrogation gives the indemnifying insurer the right to all damages recovered from the wrongdoer; the theory being that subrogation is an equitable ar-

rangement incident to all contracts of indemnity and to all payments on account thereof. *Castellane* v. *Preston,* 11 Q. B. D. 380, 388; *Phoenix Ins. Co.* v. *Erie & Western Transp. Co.,* 117 U. S. 312, 321, 6 Sup. Ct. 750, 29 L. Ed. 873."

The Court, proceeding on that theory, allowed a recovery to Cargo (as an accounting from its carrier, the *Aristea*), of *its proportion of the one-half recovery* which had been allowed the owner of the *Aristea* as a collision damage against the *Groningen.*

The case of *The Andree-The Alexander* (C. C. A., 2nd Cir.), 47 Fed. (2d) 874, page 875, is another instance where cargo (on the innocent vessel there) was limited to recovering the same proportionate part of its general average contributions as had been recovered by its carrying vessel as collision damage (*i. e.,* 90%).

The cases cited in the opinion of the Circuit Court of Appeals here, *ante,* pages 45-48, are not contrary to the above contention, nor are other cases cited below on behalf of the Respondents, such as *The Gulf of Mexico,* 1924 A. M. C. 932; and *The Lewis H. Coward,* 34 Fed. (2d) 791. These cases do not bear on the question presented in the present case; but, if they have any bearing, they support, rather than contradict, the contentions made here.

(*e*) *Conclusion.*

In the light of *The Jason, supra,* it is now possible for a shipowner, and cargo, [and other parties] to a maritime adventure to make practically any contract that they please respecting what items shall constitute general average, how they shall be paid, by whom, and under what circumstances. The liability may fluctuate from zero to thousands of dol-

lars, depending on the private agreement between the shipowner and the cargo owner.

If, therefore, the decision of the Court below is correct, the rights of cargo against non-carrying tort feasors will arise in as wide variety as may be the terms of the contract between the cargo and its carrying vessel. Obviously, this leads to an incongruous and indeterminable situation.

It would seem to be clear that the liabilities of a tortious colliding vessel should arise only in favor of the party directly injured, be limited to the usual damages for torts, and should not fluctuate with the terms of contracts between the vessel with which it collides and that vessel's cargo, to which contract it is not a party.

If by reason of the special contract between the carrying vessel and its cargo, the cargo by contract pays to the carrying vessel certain portions of the damages sustained by the carrying vessel, it is only right and equitable that the cargo paying such items by contract should be reimbursed by the carrying vessel to the extent (only) of a *ratable* share of the recovery made from the non-carrying vessel for these items. But it is wholly contrary to all principles of the law of torts that payment resulting from a purely contractual obligation should furnish a direct cause of action against a tort feasor who was not party to the contract.

LAST POINT.

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE MODIFIED: SO THAT, THE RESPONDENTS SHOULD NOT BE ALLOWED ANY RECOVERY OF THEIR CONTRIBUTIONS IN GENERAL AVERAGE DIRECT FROM THE *Sucarseco;* BUT, THE DAMAGES ARISING FROM THE COLLISION SHOULD BE ADJUSTED PRIMARILY BETWEEN THE TWO TORTIOUS COLLIDING VESSELS, THE *Toluma* AND THE *Sucarseco;* AND, THE RESPONDENTS SHOULD THEN BE ALLOWED TO RECOVER BACK FROM THE PETITIONER ONLY SUCH PROPORTIONAL PART OF THE RESPONDENTS' CONTRIBUTIONS TOWARDS ITEMS IN GENERAL AVERAGE AS THE PETITIONER IS ALLOWED TO RECOVER FROM THE *Sucarseco.*

Respectfully submitted,

WILLIAM H. MCGRANN,
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ROGER B. SIDDALL,
Of Counsel.

New York, N. Y., December 29, 1934.

APPENDIX I.

EXTRACTS FROM "GENERAL AVERAGE STATEMENT" (R. 30).

Report of American Underwriters Surveyor:

Survey was made of the vessel November 23rd, 1928 while lying at anchor off Sewalls Point, loaded with approx. 76500 cases of Gasoline, Naphtha and Kerosene, and 2261 tons General Cargo.

Bow plating, stem, and internal work in way of peak damaged, leaking slightly in way of stem but no apparent leakage in cargo holds.

After survey it was recommended that all kerosene, gasoline and naphtha be removed from No. 1 hold, also part general cargo in forward end of No. 1, and that temporary repairs be effected to allow the vessel to proceed on her voyage. This proposal however did not meet with the approval of the Newport News Shipbuilding & Dry Dock Co., they requiring that all cased gasoline, naphtha and kerosene be removed from the vessel prior to starting any hot work on the vessel, after which it was recommended that the vessel be discharged as necessary and placed on drydock for permanent repairs.

December 2, 1928. Vessel drydocked at Newport Shipbuilding & Dry Dock Co., loaded with approx. 1260 tons cargo.

Report of Foreign Underwriters Surveyor:

At a survey held on the 25th November, in company with the Owners Superintendent, it was found that the collision bulkhead was badly bulged and that the damage extended into the No. 1 hold on the port side, and it was recommended that sufficient cargo be discharged from this hold to make a further and more complete examination of the damage.

As a result of this survey held in company with the Owners Supt. and the surveyor to the U. S. Salvage Association, it was recommended that, temporary repairs be abandoned and permanent repairs be effected.

The whole of the Kerosene, Naphtha and Gasoline in the No. 1 Hold be discharged: the No. 4 Hold be also discharged for the purpose of drydocking the vessel.

At this time, the Newport S. B. & D. D. Co. were approached with a view to drydocking the vessel for repairs, and this Company declined to consider repairing the vessel without discharging the whole of the Kerosene, Naphtha and Gasoline on board the vessel.

APPENDIX II.

HARTER ACT.

An act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words and clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened or avoided.

Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United

States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damages or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

[Secs. 4, 5, 6 and 7 omitted as not material here.]

Sec. 8. This act shall take effect from and after the first day of July, eighteen hundred and ninety-three. Approved February 13, 1893. [U. S. C. A., Title 46, Sections 190-195; 27 Stat. 445.]

APPENDIX III.

Comparative National Laws of General Average.

Argentine—

> Art. 1318. Expenses occasioned by inherent defects of the ship, by her unseaworthiness, *or by some fault or negligence of the captain or of any of the crew, are not counted as general average,* even though voluntarily incurred after due council held, for the good of ship and cargo.
>
> All these expenses are to be borne exclusively by the captain or ship.
>
> (Code of Argentine Republic, Art. 1318; Lowndes, 6th Ed., p. 435.)

Brazil—

> Art. 765. *Expenses occasioned by* the inherent defect of the ship, or by *the fault or neglect of the captain or crew shall not be deemed general average,* although incurred voluntarily and after deliberation for the good of the ship and cargo. All the expenses must be borne by the captain or ship. (Art. 565.)
>
> (Brazilian Commercial Code of 1850, Title 13, Chapter 1, Article 765; Lowndes, 6th Ed., p. 488.)

England—

Under the common law, and the maritime law of General Average, as applied by the English Courts, negligence of the shipowner inducing the general average sacrifice or expense precludes the shipowner from collecting contributions in general average from the other (innocent) parties in the venture. Lowndes' General Average, Sixth Edition, page 37. It is there stated:

> "The broad principle may be laid down, then, that no one can make a claim for general average contribution, if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant or of some one for whose acts the claimant has made himself, or is made by law, responsible towards the co-contributors."

The early case of *Strang* vs. *Scott* (1889), 14 App. Cas. 601, is cited, and the words of Lord Watson, delivering the judgment of the Privy Council, are quoted, in the footnote, at page 38:

> "When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately give rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property."

Also, *The Ettrick* (Court of Appeal), L. R. 6 Prob. Div. 127.

The general rule may be modified by contract between the parties concerned. *The Carron Park,* 15 P. D. 203. It appears that a general exception of negligence will suffice to remove the disability of the shipowner to collect; but, such general exceptions are not deemed to be in contravention of "public policy", under the English law. As was stated in the case of *The Irrawaddy,* 171 U. S. at page 195:

> "By the English law parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit."

(Under the American law, the exception must be specifically expressed, hence the "Jason Clause". *The Jason,* 225 U. S. 32.)

The distinction between English and American law with respect to contracts against negligence was remarked in the case of *Tempus Shipping Co., Ltd.* vs. *Louis Dreyfus & Co.* (House of Lords), 40 Lloyd's List R. 217, p. 227, citing the case of *The Irrawaddy, supra.*

ITALY—

643 (R. 655). General average are the extraordinary expenses incurred, and the damages voluntarily sustained for the good and for the common safety of ship and cargo. • • •

19. • • •

Not considered general average, though incurred voluntarily for the common good and safety, are damage suffered or expenses incurred by the ship, *when they were occasioned* by the defect or old age of the ship, or *by the fault or neglect of the captain or crew.* (Italian Codice di Commercio, Title VII, Ch. 1, Art. 643. Lowndes, 6th Ed., 609, 614.)

HOLLAND—

§700. *When* the inherent defect of the ship, her unfitness to perform the voyage (k), or *the fault or neglect of the captain (1) or crew, has occasioned the damage or expense, such damage or expense,* although incurred purposely, after due deliberation, and for the common benefit of ship and cargo, *is not general average (m).* (Code, Book II, Ch. XI, §700; Lowndes, 6th Ed., 586-588.)

GERMANY—

§700. All damage intentionally done to ship or cargo, or both, by the master or by his orders, for the purpose of rescuing both from a common danger, together with any further damage caused by such meas-

ures, and also expenses incurred for the same purpose, are general average.

* * * * * *

§702. The application of the rules for general average is not debarred by the fact that the danger has been occasioned by the fault of a third party, or even of one of the parties interested in the adventure.

The party interested who is in fault is, however, *not only precluded from claiming compensation for any loss he may himself have sustained, but is likewise answerable to each contributor for the loss which the latter may suffer by reason of the damage being apportioned as general average.*

If the danger has arisen through the fault of one of the crew, the shipowner also is, subject to the conditions of §§485, 486(c), answerable for the consequences. (Commercial Code, Fourth Book, Seventh Section, Title 1, §§700 and 702; Lowndes, 6th Ed., 531, 532.)

SWEDEN—

§187(a). All damage intentionally done to ship or cargo in order to save ship and cargo from any danger threatening (b) both, as well as every other sacrifice made for such purpose and all damage and loss occasioned thereby (c), shall be treated as general average.

General average shall be paid by ship, cargo and freight in the proportion of their respective values, calculated in the manner mentioned in §§207-211(d).

* * * * * *

§191. The apportionment of damage resulting from general average is not precluded by the fact that the danger which occasioned the average was caused by the default of some person. *No compensation in the general average shall, however, benefit such person in default. If the danger was caused by any fault or*

neglect, for which the owner of the ship is answerable in accordance with §8(m), he shall not be entitled to compensation in general average.

In case of error of judgment on the part of the master, or the person acting on his behalf, with regard to the nature of the danger or the measures taken to avoid it, the damage should nevertheless be apportioned as in general average; the owner of the ship, however, forfeits his right to compensation, unless the measure may be excused by the exceptional nature of the circumstances under which it was adopted. Any person thus forfeiting the right to compensation, or being compelled to contribute to the average, shall have the right to recover his loss from the person legally responsible for the damage. (The Maritime Law of the 12th June, 1891, Ch. VII, §187, §191; Lowndes, 6th Ed., 705, 712.)

FRANCE—

§400. To general average belong * * *

And, in general, damage voluntarily sustained and expenses incurred after express deliberation, for the common good and safety of the ship and cargo, from their loading and departure to their arrival and discharge (h).

* * * * * *

§405. *Damage done* to the merchandise *in consequence* of the master having neglected to close the hatches, to make the ship properly fast, or to provide proper implements for hoisting, and *of all other misfortunes caused by carelessness of the master or crew, is particular average,* for which the shipper has his recourse against the master, the ship, and the freight (q).

(q) It has been decided that this provision extends to all damage and expenditures, even though done or incurred for the common safety of ship and cargo, when

due to the default of the captain (Cour de Cassation, 16th Nov. 1881, and 6th June, 1882), unless by a special clause in the charter-party or bill of lading the shipowner is exempted from liability for such default. (Cour de Cassation, 12th June, 1894; 18th Jan., 1909.) (The Law of France. Lowndes, 6th Ed., 508, 510, 513.)

NORWAY AND DENMARK—

In substance and in arrangement, the Danish and Norwegian Laws are the same as the Swedish Law. (Lowndes, 6th Ed., p. 648, 504.)

RUSSIA—

§1087. If the captain has overcharged his vessel beyond the load-water-line, and if, in case of danger, to save or lighten the vessel, he throws overboard a portion or the whole of the merchandise, the goods thus thrown overboard are not considered as averages, but the captain and shipowner should pay the entire loss. (Lowndes, 6th Ed., 671.)

PORTUGAL—

TIT. V:

Art. 635. §1. All extraordinary expenses incurred and sacrifices made voluntarily by the captain or in pursuance of his orders, with the object of avoiding a danger, for the common safety of ship and cargo, from loading and departure to return and discharge, are general or common average.

TIT. VI.

Art. 654. Justifiable grounds for putting into a port of refuge are:

* * *

* * *

3. Any accident which has disabled the ship from continuing the navigation.

• • •

Art. 658. Putting into a port of refuge is considered not to be legitimate:

• • •

• • •

3. If the accident which has made the ship unfit to continue the voyage is due to inadequacy of repairs, fitting-out or equipment, or to bad stowage, or, when it results from a wrong course of action or a want of prudence on the part of the captain.

• • • • • •

TITLE VI. Art. 660. The discharge of cargo at a port of refuge can only be authorized when it is indispensable for the repair of the ship, or on account of damage to the cargo. In these cases there should first be obtained, in the kingdom and its possessions, an authorization by a competent judge, and abroad an authorization by the consular agent, if there be one, and if not by the local authority. (Portuguese Commercial Code. Lowndes, 6th Ed., 652, 660, 661.)

SPAIN—

§811. Gross or general average consists as a general rule of all losses and expenses which are purposely incurred to save ship, her cargo, or both together, from an expected and real danger; and, in particular, of the following:

• • • • • •

§809. Simple or particular average consists generally, of all expenses and damage caused to ship or cargo, which have not been intended for the common benefit or use of all the parties interested in ship and cargo; and especially of the following:

• • • • • •

§810. The owner of the thing that has caused the expense or sustained the damage must bear particular average.

§813. Before incurring the expenses, or causing the damage connected with the general average, the captain's decision must be made after consultation with the mate and other officers of the ship, in the presence of any parties interested in the cargo who may happen to be on board.

If these should not agree to the measures, and the captain and officers, or the majority, or the captain, apart from the majority, should deem them necessary, they may be carried out on his responsibility, without prejudice to the right of the shippers to claim against the captain before the judge or proper court, if they can prove that he has acted with malice, unskilfulness, or carelessness. * * *

* * * * * *

§820. Putting in is not considered legitimate in the following cases:—

* * * * * *

4. If in the act causing the average there was any malice, negligence, thoughtlessness, or unskilfulness on the captain's part.

§821. The expenses of the putting into a port of refuge are always to the shipowner's or lessor's account; but he is not responsible for any detriment which may happen to the shippers in consequence of the putting in, provided that this was legitimate (k).

If otherwise, the shipowner and the captain are jointly responsible. (Codigo de Comercio of 1885; Lowndes, 6th Ed., pages 674, 677, 680, 683.)

JAPAN—

Art. 641. General average includes all damage and expense arising from any disposition made by the master in regard to the ship or cargo to save both from a common danger.

This provision does not affect a recourse by a party interested against any person from whose fault the danger arose. (Japanese Commercial Code, Art. 641; Lowndes, 6th Ed., 627.)

BELGIUM—

TITLE III, CHAPTER III: Art. 145 (100). In default of special agreements between all the parties, averages are regulated in conformity with the following provisions.

* * * * * *

Art. 147 (102). Extraordinary expenses incurred, and damage sustained voluntarily for the common good and safety of the ship and cargo, are general average.

All other averages are particular.

Art. 148 (103). The expenses of any port of refuge made in consequence of sea peril which, if the voyage had been continued, would have involved the ship and cargo in a state of common peril, are always considered general average. The wages and provisions of the crew, from the entry into the port of refuge until the ship has been placed in a condition to continue the voyage, are comprised in these expenses. If the reason of putting in is damage known to arise from the *vice propre* of the ship, or from a cause chargeable to the master or the crew, the expenses are particular average on the ship. But if required because of spontaneous fermentation or other *vice proper* of the goods, all the expenses are particular average on the cargo. (Lowndes, 6th Ed., p. 472.)

Appendix IV.

Part of Items of Disbursements from General Average Statement, Included in Par. 4 (a), Stipulation, R. 29.

Item	*Page*	*Subject*	*Amount*
53	90	Insurance premium on "legal liability" on cargo to destination	$ 375.00
54	92	Insurance premium on General Average charges on cargo to destination	250.00
73	112	Legal expenses in connection with embargo on cargo at destination	50.00
74	112	Legal expenses in connection with embargo on cargo at destination	18.80
75	112	Cables re preceding	31.02
76	112	Advertising re preceding	35.00
77	113	Advertising re preceding	10.00
78	113	Expenses of signing bonds on cargo	50.00
79	113	Postage (re above)	3.67
80	113	Agency fee concerning General Average security at destination	454.54
83	116	Agency fee concerning General Average security at destination	225.00
85	118	Commission on General Average disbursements	707.82
87	134	Interest on General Average disbursements	1,809.92
90	138	Drawing Average Agreement	25.00
91	138	Drawing affidavit of Master	15.00
92	138	Valuation of Toluma for G. Av	50.00
93	140	Lithographing Statement	326.00
94	140	Services of General Average Adjusters	4,000.00
95	142	Commissions for collecting and settling G. Av.	1,099.02
		TOTAL	$9,535.79

Dated: February 6, 1935.